

City of Detroit


CITY COUNCIL

DAVID D. WHITAKER
Director
(313) 224-4946

DIVISION OF RESEARCH & ANALYSIS
Coleman A. Young Municipal Center
2 Woodward Avenue, Suite 216
Detroit, Michigan 48226
(313) 224-4946
FAX: (313) 224-0368

PEGGY ROBINSON
Deputy Director
(313) 224-4946

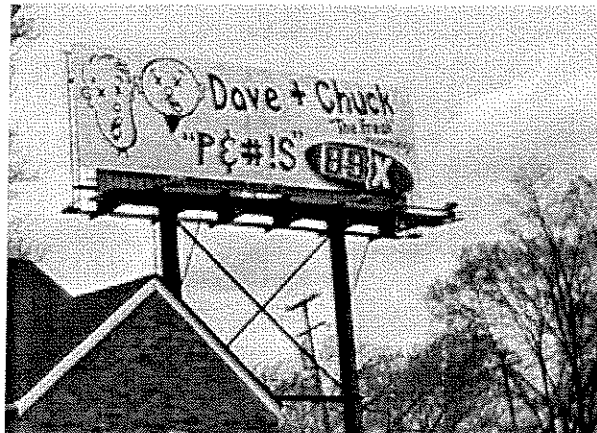
TO: The Honorable Neighborhood & Community Services Standing Committee

FROM: David Whitaker, Director 

DATE: May 4, 2010

RE: Offensive Billboards: **It's Friday B!#ches**

The Research & Analysis Division (RAD) was requested by Council Member Andre Spivey to investigate billboards placed in the City of Detroit by Radio Station 89X that advertised station programming in a provocative manner. Although the particular sign that member Spivey's assignment addresses has been removed, a photo of its replacement is as follows:



Background

Radio station CIMX-FM is the call sign a radio station based in Windsor, Ontario, Canada. The station is referred to as 89X and can be found on 88.7 FM. The station airs a modern rock format, and its slogan is "89X: Windsor/Detroit's Only New Rock Alternative". The targeted audience is listeners 18-34 years old and the program utilizes a "shock jock" format.

Station 89X has an ongoing media campaign to promote the Dave + Chuck morning drive time program. Following the "shock jock" format, 89X has morphed their "shock"

format into their billboard media campaign. In accordance with their media campaign, the station has rented several billboards in the metropolitan area, including Detroit.

The billboard advertisement in question states “**It’s Friday B!#ches**” which relates to the station’s slogan for their Friday drive time show. The slogan has been in constant use for years, with radio listeners calling the station to complain when the disc jockeys don’t yell over the air “**It’s Friday B!#ches**”.

The Research & Analysis Division staff has visited several sites where the alleged offensive billboards had been placed. An investigation of the areas revealed the billboards displaying the advertisement “**It’s Friday B!#ches**” have been removed from the reported locations in the city of Detroit. Billboards are still erected along I-94 in Mt. Clemens, Romulus and Canton loudly displaying their slogan.

Recently a new billboard erected at the corner of 7-Mile and the Lodge Freeway displays “**Pc#!S**”, and is part of the 89X marketing campaign.

This type of billboard advertising is protected under the First Amendment, as commercial speech, essentially because it cannot reasonably be regarded as either “misleading” or relating to “unlawful activity.” The principal holdings of leading cases from the US Supreme Court and the Sixth Circuit Court of Appeals (which includes Michigan) can be summarized as follows:

- While other forms of expression are entitled to more protection under the First Amendment than is commercial speech, the protection provided to commercial speech is nevertheless considerable. The United States Supreme Court has outlined a four-part test that subjects restrictions on commercial speech to a form of intermediate scrutiny. Under the first prong of the [US Supreme Court’s controlling] *Central Hudson* test, the commercial speech at issue must concern lawful activities and not be misleading, thus entitling it to First Amendment protection. If the speech is entitled to protection, the remaining prongs of the *Central Hudson* test provide the framework for determining the validity of the restriction. More specifically, a restriction on protected commercial speech will be upheld if the government asserts a substantial interest in support of its regulation, demonstrates that the restriction on commercial speech directly and materially advances that interest, and draws the regulation narrowly. These requirements form the second, third, and fourth prongs of the *Central Hudson* test. On each point, the government bears the burden of establishing the constitutionality of its regulatory scheme. *Pagan v. Fruchey*, 492 F.3d 766 (CA 6 2007); *Chambers v. Stengel*, 256 F.3d 397 (CA 6 2001) *Marras v. City of Livonia*, 575 F. Supp. 2d 807 (ED MI 2008); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980)

In summary, the billboards in question are examples of commercial speech. The First Amendment to the US Constitution (as well as provisions of the State of Michigan’s

Constitution) prohibits government from restricting such protected speech. The courts have held that regulation of such speech must meet a stringent, 3-pronged test, or it will be invalidated if challenged: 1) a substantial interest; 2) direct and material advancement of that interest by government restriction; and 3) narrowly drawn regulation. On the facts of this matter as outlined in the report, confidence is extremely high that a regulation or ordinance intended to prohibit this particular form of commercial speech would fail to meet those standards.

Moreover, even assuming for the sake of argument that such an interest in civility, preventing rudeness, profanity or sexist language, or the like could be demonstrated, it seems virtually impossible to conceive of a government prohibition of such language that would be both a direct and material advancement of such an interest and narrowly drawn. Among other significant legal and constitutional objections to such prohibitions or regulation of protected speech, any regulations would either have to narrowly target the phrase(s) in question, and thus arguably fail to directly and materially advance the asserted government interest (failing the second prong of the test), or risk imposing broad and vague prohibitions on "bad language" that would not be sufficiently specific and narrow to satisfy the final prong. The case law regarding commercial speech, objectionable profanity and attempts by government to regulate it is extremely extensive and presents many challenging ideas. This particular situation does not seem to present a strong, or even a close, case for upholding such a restriction.